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IN THE
Supreme Court of the United States

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.
Petitioner,

v.

ZONING HEARING BOARD OF EASTTOWN TOWNSHIP,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICI CURIAE* OF AT&T WIRELESS SERVICES, INC. AND CELLCO PARTNERSHIP, D/B/A VERIZON WIRELESS, IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici curiae AT&T Wireless Services, Inc. and Cellco Partnership, d/b/a Verizon Wireless, through their subsidiaries and affiliates provide personal wireless services to approximately 60 million subscribers. The Courts of Appeals currently disagree on the proper interpretation of the section of the Telecommunications Act of 1996 ("TCA") proscribing actions of local authorities that have the effect of prohibiting the provision of personal wireless services. 47 U.S.C. § 332 (c)(7)(B)(i)(II) (2000) (the "prohibition restriction"). In particular, the "one provider" rule articulated by the Court of Appeals for the Third Circuit, which denies relief under the prohibition restriction if at least one other provider in an area are can provide service to *its* subscribers, has the paradoxical effect of denying personal wireless services to subscribers of other providers in that area.

The Third Circuit's interpretation of the prohibition restriction, if permitted to stand, would be detrimental to millions of *amici's* subscribers as well as subscribers of other providers.[1] The confusion surrounding the proper interpretation of the prohibition restriction also greatly complicates local zoning board consideration of thousands of applications for individual facilities and impedes *amici's* efforts to develop the nationwide facility networks necessary to provide the seamless, ubiquitous and reliable personal wireless services envisioned by Congress and the FCC.

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[1] No counsel for any party in this case authored this brief in whole or in part, and no person or entity other than *amici curiae* and their members made any monetary contribution to the preparation or submission of this brief. All parties have given their consent in writing to the submission of this brief.

SUMMARY OF ARGUMENT

This matter presents the question whether a personal wireless services provider can be denied the ability to provide services within its licensed service area because another provider already provides service in that area. Given Congress' stated goal to promote competition, reduce regulation, encourage rapid deployment of new telecommunications technologies and ensure availability of seamless, ubiquitous and reliable personal wireless services, the answer to this question must be "no."

In the TCA, Congress sought to preserve a local voice in facility siting while ensuring that parochial interests would not frustrate national telecommunications policy. The prohibition restriction seeks to ensure that the question addressed at the local level is not what services should be available but where the necessary facilities should be located. There is a significant split of opinion among the Courts of Appeals on interpretation of the prohibition restriction. As the statute in question governs individual decisions of local zoning boards, this split of opinion results in confusion and uncertainty in thousands of local land use application proceedings.

The one provider rule formulated by the Third Circuit denies providers and their subscribers the protection of the prohibition restriction if another provider already operates in the area to be served. This reading of the statute has been repudiated by the First Circuit and misinterprets the TCA to the detriment of the very consumers Congress sought to protect. For the prohibition restriction to have any efficacy it must be applied in a manner that permits each provider to secure approval of the facilities necessary to provide seamless, ubiquitous and reliable service to its subscribers.

ARGUMENT

The explosive growth of personal wireless services[2] reflects an extraordinarily successful example of deregulation permitting market forces to drive the rapid deployment of new technologies of great public benefit. In the span of a decade, personal wireless services have transformed from a high-tech business tool available to a few into a mass-market consumer product that has become an integral part of American life.[3] Over 144 million Americans now subscribe to a personal wireless service, and it has been estimated that over 30% of calls previously transmitted by the land-line telephone network are now transmitted wirelessly.[4]

The key to this growth has been the persistence of Congress and the FCC in shielding personal wireless services from the potentially stultifying effects of state and local regulation. Even at the federal level, the FCC is

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[2] The term "personal wireless services" includes cellular, PCS, SMR and wireless data transmission. Technically, "cellular" is the regulatory term for the first personal wireless services licensed to exploit the then newly developed technology of a coordinated network of facilities using low-powered, limited range transmissions to provide mobile telecommunications. FIRST ANNUAL REPORT AND ANALYSIS OF COMPETITIVE MARKET CONDITIONS WITH RESPECT TO COMMERCIAL SERV., FCC 95-317, at 13 [hereinafter FIRST ANNUAL REPORT]. PCS and SMR are functionally equivalent and technically similar services operating in slightly different frequency ranges.

[3] *See* FIRST ANNUAL REPORT, FCC 95-317 at 3 (describing personal wireless services in 1995 as a business tool serving 24 million customers). Emblematic of the speed with which this transition occurred, by 1997 a personal wireless services plan had been added to the Consumer Price Index's "basket" of goods and services. EIGHTH ANNUAL REPORT AND ANALYSIS OF COMPETITIVE MARKET CONDITIONS WITH RESPECT TO COMMERCIAL SERV., FCC 03-150, at 45 n.319 [hereinafter EIGHTH ANNUAL REPORT].

[4] EIGHTH ANNUAL REPORT, FCC 03-150 at 5, 49.

mandated by statute to conduct an annual review of competition in the personal wireless services industry, 47 U.S.C. § 332(c)(1)(C), and periodically review and eliminate regulations that have proven unnecessary due to the self-regulatory effects of market forces. 47 U.S.C. § 161(a)(2).

Despite widespread subscriber demand and the tremendous utility of personal wireless services, there is a long history of local hostility to the facilities necessary to provide service. Applications have been subject to interminable delays,[5] and are frequently denied for pretextual reasons in response to "not in my backyard" objections or unfounded concerns over radio emission safety. Congress recognized that such resistance threatened development of the facility networks necessary for efficient utilization of the radio spectrum dedicated to personal wireless services. Therefore, in the TCA, Congress expressly preempted certain conduct on the part of local authorities and subjected application denials to federal court review. *See* H.R. No. 104-204, at 94, *reprinted* in 1996 *Code Cong. & Admin. News*, at 61 ("Such requirements will ensure an appropriate balance in policy and will speed deployment and the availability of competitive wireless telecommunications services which ultimately will provide consumers with lower costs as well as with a greater range and options for such services.").

Of particular relevance to this appeal, the section of the TCA addressing prohibition of services provides that:

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[5] The most extreme example of such delay might be the application at issue in *Cellular Tel. Co. v. Zoning Bd. of Adj. of Ho-Ho-Kus*, 197 F.3d 64 (3d Cir. 1999), which was the subject of 61 zoning board hearings over seven years before finally being approved and put in service in 2001.

> [t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof-- ... *shall not prohibit or have the effect of prohibiting the provision of personal wireless services.*

47 U.S.C. § 332(c)(7)(B)(i)(II) (emphasis added). [6]

By mandating that service be permitted, the prohibition restriction seeks to limit the issue addressed at the local level to determining where the facilities necessary for service should be located. It is incomprehensible that Congress, in a statute preempting local regulations that would have the effect of prohibiting the provision of personal wireless services, intended for that statute to be interpreted in a manner which places in the hands of local zoning officials ultimate control over the number of licensed providers servicing an area. That, however, is exactly the result of the Third Circuit's one provider rule.

A. The Petition Should Be Granted to Provide Clear Guidance on the Effect of the Prohibition Restriction.

The prohibition restriction is in dire need of uniform interpretation. At present, the Courts of Appeals for the First, Second, Third and Fourth Circuits have all adopted

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[6] In addition to the prohibition restriction, §332(c)(7)(B)(ii) requires applications for facilities to be resolved in a reasonable period of time, §§(B)(iv) prohibits denials based on the environmental effects of radio frequency emissions that comply with emission regulations; §§(B)(i)(I) prohibits denials that unreasonably discriminate among providers of functionally equivalent services. Denial decisions must also be in writing and the state law substantive grounds for denial supported by substantial evidence. §§(B)(iii).

interpretations of the prohibition restriction that conflict with each other. This results in manifest confusion in district court and state court decisions, particularly in jurisdictions not bound to follow any of the existing standards. Because the prohibition restriction governs the validity of local zoning decisions, this uncertainty is particularly problematic. Over the course of a year, thousands of applications for such facilities will be brought before local zoning boards. These bodies, and the providers appearing before them, need to know the effect of the prohibition restriction on the applications before them. The current uncertainty complicates the application process, spawns litigation and impedes the development of the facility networks needed to provide seamless, ubiquitous and reliable service.

Providers and local boards have been frustrated by this uncertainty for years. In the earliest federal appellate decision addressing the prohibition restriction, the Court of Appeals for the Fourth Circuit formulated an unduly narrow standard, holding that an individual zoning decision could not violate the prohibition restriction since the provision applies only to blanket prohibitions. *AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*, 155 F.3d 423, 429 (4th Cir. 1998). Under this interpretation, which remains the most restrictive applied by any jurisdiction, the prohibition restriction has become a nullity except in those now-rare instances in which a local authority is impolitic enough to articulate an express ban.[7]

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[7] In *360 Degrees Communications Co. of Charlottesville v. Board of Supervisors of Albemarle County*, 211 F.3d 79, 87 (4th Cir. 2000), the Fourth Circuit suggested as a "theoretical possibility" that under an extreme set of facts, it *might* find something less overt than an express ban to give rise to a prohibition of service. The Fourth Circuit itself dismissed this possibility as "unlikely in the real world." *Id.*

All other Courts of Appeals that considered this issue have recognized that, since most regulation of land use occurs through decisions on individual applications, the prohibition restriction must apply to more than express bans. *See, e.g., Voicestream Minneapolis, Inc. v. St. Croix County*, 342 F.3d 818 (7th Cir. 2003)(rejecting *Virginia Beach* standard). In *Town of Amherst, N.H. v. Omnipoint Communications Enter., Inc.*, 173 F.3d 9 (1st Cir. 1999), the Court of Appeals for the First Circuit held that an individual denial could violate the prohibition restriction if the circumstances, viewed *de novo* by a reviewing court, demonstrated "such fixed hostility by the Board that one can conclude that further applications would be useless." *Id.* at 14.

Roughly contemporaneous with the *Amherst* decision, the Court of Appeals for the Second Circuit formulated a different standard. In *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630 (2d Cir. 1999), the Second Circuit recognized that if a proposed facility was the least intrusive means of filling a gap in service, it could be presumed that if such an application was denied, any other application would meet the same fate, making the denial an effective prohibition in violation of the TCA. Both the First and Fourth Circuits have expressly rejected the least intrusive means element of the *Willoth* test.

The Court of Appeals for the Third Circuit, however, embraced the least intrusive means test and other aspects of *Willoth* in *Ho-Ho-Kus*, 197 F.3d at 70. There, the Third Circuit held that a gap exists when a subscriber using a hand-held phone is "unable either to connect with the land-based national telephone network, or to maintain a connection capable of supporting a reasonably uninterrupted communication." *Id.* The Third Circuit suggested that a gap

would be significant where, due to its size, population density and/or traffic volume, the gap would impact a large number of subscribers. *Id.* at 70 n.2 (based on findings made *de novo* by the reviewing court. *Id.* at 71.).

In *APT Pittsburgh Ltd. v. Penn Township*, 196 F.3d 469 (3d Cir. 1999), however, the Third Circuit for the first time articulated the one provider rule and required that a prohibition claim "include evidence that the area the new facility will serve is not already served by *another* provider." *Id.* at 480 (emphasis added). The Third Circuit has never offered any justification for this rule based on statutory language or legislative intent. The rule instead is the product of misinterpretation of *dicta* in *Willoth* suggesting that "once an area is *sufficiently* serviced by a wireless service provider ... [s]tate and local governments may deny subsequent applications without thereby violating [the prohibition restriction]." *Willoth*, 176 F.3d at 643 (emphasis added). No explanation was given by the Third Circuit in *Penn Township* for insertion of the word "another" or deletion of the word "sufficiently" compared to the original language in *Willoth.*[8]

In *Second Generation Props., L.P. v. Town of Pelham*, 313 F.3d 620 (1st Cir. 2002), the First Circuit conducted a thorough examination of the statutory language, legislative history and regulatory framework, and found that there was no justification for the one provider rule. In

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[8] Reported district court decisions in the Second Circuit have declined to follow *Penn Township* and do not read *Willoth* as adopting the one provider rule, *see, e.g., Nextel Partners, Inc. v. Town of Amherst*, 251 F. Supp. 2d 1187 (W.D.N.Y. 2003); *Cf. Site Tech Group, Ltd. v. Town of Brookhaven BZA*, 140 F. Supp. 2d 255, 263-65 (E.D.N.Y. 2001)(citing one provider rule as an alternate grounds for denial).

reaching this conclusion, the First Circuit stressed the counterproductive effect of the rule on subscribers:

> Such a rule would be highly problematic because it does not further the interest of the individual consumer. To use an example from this case, it is of little comfort to the customer who uses AT&T Wireless (or Voicestream, Verizon, Sprint or Nextel) who cannot get service along the significant geographic gap which may exist along Route 128 that a Cingular Wireless customer does get some service in that gap. Of course, that AT&T customer could switch to Cingular Wireless. But were that rule adopted, the same customer might well find that she has a significant gap in coverage a few towns over, where AT&T Wireless, her former provider, offers service but Cingular Wireless does not. *The result would be a crazy patchwork quilt of intermittent coverage....When Congress enacted legislation to promote the construction of a nationwide cellular network, such a consequence was not, we think, the intended result.*

Second Generation, 313 F.2d at 633 (emphasis added).

Ironically, in *Omnipoint Comm. Enter. v. Easttown Tp.*, 319 F.3d 627 (3d Cir. 2003)(*Easttown Tp.* II), a panel of the Third Circuit initially rejected the one provider rule, noting that it was inconsistent with legislative intent, the relevant regulatory framework, and the *Willoth* decision from which it was derived. The panel's later withdrawal of this opinion relied solely on Third Circuit internal operating procedures binding individual panels to rulings contained in prior published opinions. *Omnipoint Comm. Enter. v. Easttown Tp.*, 331 F.3d 386, 396 (3d Cir. 2003)(*Easttown*

Tp. III). The Third Circuit's failure to offer any substantive justification for the one provider rule, either on reconsideration or in denying *en banc* review, is remarkable in light of the *Second Generation* decision and a vigorous dissent from Judge Rosenn stressing the flaws highlighted by the First Circuit. Indeed, it does not appear that *any* tribunal has *ever* advanced a substantive justification for the rule, which, by dint of repetition alone, has assumed a jurisprudential life of its own.

Lower courts looking for guidance have thus been confronted with a situation in which the First Circuit has rejected the Third Circuit's one provider rule and the Second Circuit's least-intrusive means test. The Fourth Circuit has rejected the Second and Third Circuit tests, and the First, Second, Third and Seventh Circuits in turn have rejected the Fourth Circuit's entire approach to interpretation of the prohibition restriction. The Third Circuit has adopted the Second Circuit's least intrusive means test, but has adopted the one provider rule, which the Second Circuit has not.

Not surprisingly, this conflict among the Courts of Appeals has resulted in an even greater difference of opinion among lower courts. In California, for example, one district court has embraced the one provider rule without reservation, *see Airtouch Cellular v. City of El Cajon*, 83 F. Supp. 2d 1158, 1167-68 (S.D. Cal. 2000)(following *Penn Township*), while another has rejected that rule. *See MetroPCS v. San Francisco*, 259 F. Supp. 2d 1004, 1013-14 (N.D. Cal. 2003)(following *Second Generation*). Such disagreements have arisen time and again across the country. *See, e.g., APT Minneapolis, Inc. v. Eau Claire County*, 80 F. Supp. 2d 1014, 1025 (W.D. Wisc. 1999)(following *Amherst*); *Bellsouth Mobility, Inc. v. Parish of Plaquemines*, 40 F. Supp. 2d 372, 381 (E.D. La 1999)(following *Virginia*

Beach); *AT&T Wireless PCS, Inc. v. Town of Porter*, 203 F. Supp. 2d 985, 1001 (N.D. Ind. 2002)(following *Penn Township*); *Nextel Partners of Upstate N.Y., Inc. v. Town of Canaan*, 62 F.Supp. 2d 691, 697 (N.D.N.Y. 1999)(following *Willoth*); *SiteTech Group, Ltd v. Town of Brookhaven BZA*, 140 F. Supp. 2d 255 (E.D.N.Y. 2001)(following *Penn Township*); *Nextel v. Town of Amherst*, 251 F. Supp. 2d at 1195-96 (following *Second Generation* and rejecting *Penn Township*); *Independent Wireless One Corp. v. Town of Charlotte*, 242 F. Supp. 2d 409, 419 (D. Vt. 2003)(rejecting *Penn Township*); *Sprint Spectrum, L.P. v. Board of County Commn'rs of Jefferson County*, 59 F. Supp. 2d 1101, 1109 (D. Colo. 1999)(following *Amherst*).

For local zoning boards, unless their own state courts of last resort have addressed this issue, *all* of the conflicting decisions discussed above represent persuasive authority. Some boards, concerned about denying an application entitled to approval on prohibition grounds, mandate that applicants prove the coverage of all providers in the area, a difficult, costly and time-consuming task.[9] Others, perhaps looking for a pretext to deny an application, have attempted

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[9] One problem of the one provider rule, as well as the middle ground advocated by the dissent below of determining prohibition based on a ratio of customers who cannot receive service compared to total customers, *Easttown Tp.* III, 331 F.3d at 401-02 (Rosenn, J. dissenting), is that the data necessary to make this calculation is either unavailable or proprietary. The flaws in Omnipoint's expert testimony criticized below in fact illustrate the difficulty of one provider attempting to measure the service of another. *Compare Easttown Tp.* III, 331 F.3d at 398 (describing efforts to judge service based on 80 calls made with a phone from another provider plugged into a laptop computer) *with Ho-Ho-Kus*, 197 F.3d at 69 (describing standard method of a provider measuring its own service based on thousands of calls monitored with specialized equipment). In addition, given that customers are by definition mobile, there is no reliable method of determining the number of a particular provider's customers inconvenienced by a specific gap.

to subpoena other providers to compel them to appear and prove that they have coverage. The extent to which federal telecommunications policy favors availability of services from all licensed providers also has potential relevance to public policy balancing tests under the zoning laws of some states. Doubt over what the prohibition restriction means complicates and protracts zoning hearings and leads to a great deal of litigation that might otherwise be avoided. Because personal wireless services technology depends on a large number of local sites, the delay and confusion caused by this uncertainty is compounded thousands of times a year in municipal halls across the country.

Omnipoint's petition presents an appropriate vehicle for remedying the uncertainty surrounding interpretation of the prohibition restriction. Resolving these questions would in turn remove a significant impediment to the ongoing development of providers' facility networks. Given the importance of this issue and the widespread confusion resulting from the conflicting judicial pronouncements, this Court should hear the instant case.

B. The Statutory and Regulatory Framework Anticipates Application of the Prohibition Restriction on a Provider-By-Provider Basis.

The one-provider rule ignores the regulatory and legislative history of personal wireless services and frustrates the basic policy underlying the prohibition restriction. When the FCC licensed personal wireless services, it made a policy decision to reallocate scarce space in the electromagnetic spectrum to exploit the unique ability of this technology to meet increasing demand by subdividing cells and re-using frequencies, thereby increasing capacity without consuming

additional bandwidth. *In re Cellular Communications Sys.*, 86 F.C.C.2d 469, 474-82 (1981), *reh'g denied*, *In re Advanced Mobile Phone Serv., Inc. North-West Tel. Co. & GTE Mobilenet of Milwaukee, Inc.*, No. 79-318, 1986 WL 292526 (F.C.C. Jan. 6, 1986). Making a further deliberate judgment that this technology could best be made available through market forces, the FCC allocated sufficient bandwidth to license multiple providers in each area. *In re Cellular Communications Sys.*, 86 F.C.C.2d at 474-82.

Given Congress' presumed awareness of these cornerstones of personal wireless services regulation, it could not have intended the prohibition restriction to protect only one provider in an area. The FCC considered and rejected licensing schemes in which one provider would be deemed sufficient to service an area. *In re Cellular Communication Sys.*, 86 F.C.C.2d at 471-72. It therefore preempted state regulatory schemes that might have had the effect of permitting only one provider to provide service in an area. *Id.* at 505 ("requiring demonstration of a general public need for cellular service could adversely affect our frequency allocation or delay the rapid implementation of cellular service, both of which are central elements of the federal design for cellular operations.").[10] It also noted that "the inability of any cellular licensee to provide service could significantly inconvenience the public and cause a huge amount of spectrum to be unused," in contravention of the FCC's mandate to ensure efficient use of the electromagnetic spectrum. *Id.* at 502. Out of a conviction

[10] Other TCA provisions preempt state and local authorities from regulating market entry by personal wireless services providers, *see* 47 U.S.C. § 332(c)(3)(A), and prohibit state and local legal requirements that "may prohibit, or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a).

that the then current availability of service from *two* providers was insufficient to provide the desired competition and availability of service, the FCC later reinforced this policy of multiple providers by reallocating further bandwidth to license an additional six PCS providers and at least one SMR provider per market area.

These policies were emphatically reaffirmed in the TCA, which reflects Congress' intent to promote competition and reduce regulation "in order to secure better prices and higher quality services for American telecommunications consumers and encourage rapid deployment of new telecommunications technologies." TCA, Pub. L. No. 104-104, 110 Stat. 56. In the specific context of personal wireless services, Congress directed that regulation of this technology be guided by the desire to "improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users," and to "encourage competition and provide services to the largest feasible numbers of users[.]" 47 U.S.C. § 332(a)(2), (3). The one provider rule, by denying service to customers of certain providers and preventing the utilization of the providers' assigned spectrum in certain areas, is directly contrary to Congressional intent.

The one provider rule is also hostile to the primary goal of wireless telecommunications policy: to "promote the safety of life and property." 47 U.S.C. § 332(a)(1). In the years following enactment of the TCA, both Congress and the FCC, to ensure availability of 911 service to all personal wireless subscribers, have articulated a public policy in favor of "the construction and operation of seamless, ubiquitous, and reliable telecommunications systems" as a means to that end. Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, 113 Stat. 1286 (1999). *See also In*

re Revision of Rules to Ensure Compatibility With E911 ECS, Memorandum Opinion and Order 12 F.C.C.R. 22,665 (1997); 47 C.F.R. § 20.18; *In re Revision of Rules to Ensure Compatibility With E911 ECS, Second Report and Order*, 14 F.C.C.R. 10,954, 10,962-63 ¶ 19 (1999)(mandating provision of 911 and E911 services).

Seamless, ubiquitous and reliable access to personal wireless 911 service for subscribers of all licensed providers is a planned by-product of the decision by Congress and the FCC to permit market forces to expedite network development. After the events of September 11, 2001, which demonstrated the robustness of such systems, public safety concerns have assumed even greater importance. *See* DALE HATFIELD, A REPORT ON TECHNICAL AND OPERATIONAL ISSUES IMPACTING THE PROVISION OF WIRELESS ENHANCED 911 SERVICES 15 (2002), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513296239. Over one-third of all 911 calls are now made from wireless phones. Related trends, including subscribers discontinuing land-line service, place an even greater premium on the availability of "seamless, ubiquitous and reliable" personal wireless systems as a means of providing 911 services. *Id.* The one provider rule clashes with these goals.

C. The One-Provider Rule Has the Effect of Prohibiting Services.

The one-provider rule directly undermines the prohibition restriction's focus "upon the end result to the consumers and their reception of uninterrupted wireless telephone service." *Omnipoint Comm. Enter. v. Newtown Township*, 219 F.3d 240, 244 (3d Cir.), *cert. denied*, 531 U.S. 985 (2000). The fact that service is available to

subscribers of another provider is irrelevant to subscribers of the provider seeking to fill the gap. Subscribers of a provider without coverage in an area are "unable to connect with the land-based national telephone network or to maintain a connection capable of supporting a reasonably uninterrupted connection." *Ho-Ho-Kus*, 197 F.2d at 70 (defining elements of prohibition of service). The "end result" to these subscribers is that they cannot use their phones.

The implicit assumption of the one provider rule is that service by one provider in an area is sufficient. This assumption ignores the fact that, due to numerous factors, *subscribers of one provider cannot receive service through the facilities of another provider.* As a matter of federal policy favoring competition, in most areas there are competing providers for each type of personal wireless service. Cellular providers were originally required to utilize a common analog format, but were later permitted to shift most of their spectrum allocation to varying digital formats, reflecting the FCC's policy to encourage providers to adopt new technologies to respond to market demands. *See* FIRST ANNUAL REPORT, FCC 95-317 at 16. PCS and SMR use a variety of incompatible all-digital formats, including GSM, CDMA, TDMA, and IDEN. Driven by intense customer demand for more efficient wireless data transfer, a movement is already underway towards implementation of different third generation, or "3G" formats, with each carrier developing formats tailored to providing different mixes of services.

While there are isolated circumstances in which subscribers of one provider can access the network of another, these exceptions are sufficiently rare and difficult to implement that the FCC has dismissed the prospects of most

subscribers doing so as theoretical. *In re Revision of Rules to Ensure Compatibility With E911 ECS, Second Report and Order*, 14 F.C.C.R. at 10,954-76 ¶¶3, 6, 21-26, & n.31, 35, n.47. Furthermore, even when possible, using another provider's network generally requires initiating a new call, obtaining operator assistance and use of a credit card. Not only is this practice cumbersome, it does not permit a subscriber to maintain a connection when moving between cells, an integral element of the definition of "service" utilized by the Second and Third Circuits. *See Ho-Ho-Kus*, 197 F.3d at 70.

In light of the importance Congress and the FCC have placed on making 911 service available to all subscribers, the Third Circuit's standard is particularly problematic. The assumption that it is permissible for municipalities to act in a manner that has the effect of rendering 911 service unavailable to customers of some providers poses a threat to public health and safety and is inconsistent with Congressional intent and the federal regulatory scheme. *In re Revision of Rules to Ensure Compatibility With E911 ECS, Second Report and Order*, 14 F.C.C.R. at 10,962-63 ¶ 19 (1999)("The failure to deliver 911 calls because of coverage gaps can contribute to tragic outcomes in these emergency situations.").

Finally, as the First Circuit recognized in *Amherst*, 173 F.3d at 16, the prohibition restriction assumes particular importance when a denial that leaves a substantial gap in a provider's network is not subject to challenge under other

provisions of state or federal law.[11] It is common for local ordinances to exclude personal wireless facilities as permitted uses in areas in which facilities are needed to provide services. In addition, many states require a showing that a site is amenable to *no* permitted use as a condition for a use variance. Where, as is the case in Easttown Township, these two impediments coincide, it is *impossible* under state law to secure approval of a personal wireless facility, regardless of the need for the proposed facility.

If a necessary site cannot be approved under state law, relief under the TCA's substantial evidence provision is also unavailable, as that provision is governed by state substantive law. In such circumstances, if relief under the prohibition restriction is not available, *no relief is available.* The affected subscribers must simply do without service. As a result, they are deprived of the quintessential benefit of the Information Age revolution made possible by personal wireless services: mobility without sacrificing the ability to stay in contact. They lose the ability to make calls, summon emergency services, and, what is frequently most important, *the confidence that they can be reached by a call to the same number*, regardless of where they travel in their provider's service area.

In interpreting the prohibition restriction to *permit* prohibition of service to subscribers of other providers so

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[11] In particular, since land parcels are inherently unique and virtually *any* difference has been found sufficient to justify disparate treatment, the unreasonable discrimination provision has essentially become a dead letter. *See Second Generation*, 313 F.3d at 634-35 (questioning efficacy of discrimination provision). Indeed, it is not uncommon for discrimination claims to be rejected for applications to mount antennas on an existing structure on which another provider's facility is *already* located. *See, e.g., Nextel Comm. v. City of Cambridge*, 246 F. Supp. 2d 118 (D. Mass. 2003); *City of El Cajon*, 83 F. Supp. 2d 1158.

long as subscribers of one provider can receive service, the one provider rule misinterprets the TCA. It does so to the detriment of the very consumers Congress sought to protect.

Properly viewed, prohibition of services occurs whenever a provider is unable to secure approval of the facilities necessary for its customers to be able to rely on their ability to use their phones. It does not matter whether this inability is the result of an express ban, or a denial of a facility application for the only feasible location, or a denial under circumstances that would lead a reasonable person to conclude that all other applications would meet the same fate. The practical result to subscribers is the same: they cannot use their phones. For the prohibition restriction to have any efficacy, it must be applied in a manner that permits each provider to secure approval of the facilities necessary to provide seamless, ubiquitous and reliable service to its subscribers.

CONCLUSION

For the reasons set forth above, AT&T Wireless Services, Inc. and Cellco Partnership, d/b/a Verizon Wireless respectfully request that the Petition for Writ of Certiorari of Omnipoint Communications Enterprises, L.P., be granted.

Respectfully submitted,

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